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No. 97-16

Supreme Court, U.S.
FILED
DEC 16 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Respondents' challenge to the Wayne National Forest Land and Resource Management Plan, developed by the United States Forest Service in accordance with the National Forest Management Act of 1976, presents a justiciable controversy?

2. Whether the Forest Service is, by virtue of the statutes under which it operates, institutionally biased in favor of timber production in a judicially remediable way?

3. Whether the Sixth Circuit erred in holding that the Wayne Forest Plan was inconsistent with applicable legal requirements?

PARTIES TO THE PROCEEDINGS

Petitioner Ohio Forestry Association, Inc. was an appellee before the court of appeals and an intervening defendant at the district court level. The Chief of the United States Forest Service within the Department of Agriculture (then Jack Ward Thomas and currently Mike Dombeck) was the lead appellee before the court of appeals and lead defendant at the district court level. The other named defendant-appellees are Department of Agriculture officials: the Secretary of Agriculture (then Mike Espy and now Dan Glickman), the Regional Forester for the Eastern Region (then Floyd J. Marita and now Robert T. Jacobs), and the Forest Supervisor for the Wayne National Forest (then Eurial E. Turner and now Jose A. Zambrana). The Sierra Club and the Citizens Council on Conservation and Environmental Control were the appellants before the court of appeals and plaintiffs in the district court.

The names of the current federal officials have been substituted pursuant to Rule 33. Pursuant to Rule 29.6, Petitioner states that the Ohio Forestry Association, Inc. has no parent or subsidiary corporations.

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OPINIONS BELOW

The January 21, 1997 opinion of the United States Court of Appeals for the Sixth Circuit reversing the grant of summary judgment to the government (Pet. App. A, 1a-9a) is reported at 105 F.3d 248. The April 7, 1997 order of the Sixth Circuit, denying rehearing and rehearing *en banc* (Pet. App. F, 131a-32a), is unreported. The March 11, 1994 opinion of the district court granting summary judgment in favor of defendants (Pet. App. B, 10a-48a) is reported at 845 F. Supp. 485. The district court's opinion excluding evidence going beyond the administrative record (Pet. App. C, 49a-65a) is unreported. The 1990 and 1992 administrative appeal decisions affirming the legality of the Land and Resource Management Plan - Wayne National Forest (Pet. Apps. D and E, 66a-130a) are unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on January 21, 1997. Petitioner sought rehearing and rehearing *en banc* on March 3, 1997, which was denied on April 7, 1997. The petition for a writ of certiorari was filed on July 1, 1997 and was granted on October 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant provisions of the United States Constitution, and of the National Forest Management Act and other National Forest System laws, are reprinted in Pet. App. H, 146a-64a.

STATEMENT OF THE CASE

This case raises questions concerning the justiciability of a facial challenge to a forest plan. If jurisdiction exists, this case presents merits issues with respect to the Forest Service's management of the national forests and the limited role of the federal courts in overseeing that management.

The National Forest System and Forest Plans

1. The National Forest System comprises more than 191 million acres of federal lands. *See* 16 U.S.C. § 1609; 36 C.F.R. § 200.2 to .3; 58 Fed. Reg. 19369 (April 14, 1993). The System is managed by the United States Forest Service, an agency within the Department of Agriculture. Section 475 of Title 16 provides that: "No national forest shall be established, except . . . for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

The Multiple-Use Sustained-Yield Act of 1960 ("MUSYA") broadened the permissible uses of national forests. It states the "policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. The new multiple uses, however, were *not* to be administered "in derogation of" the water flows and timber supply purposes expressed in "section 475." *Id.*; *see United States v. New Mexico*, 438 U.S. 696, 707-15 (1978).

MUSYA directs the Secretary of Agriculture to "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. § 529. Both "sustained yield" and "multiple use" are defined terms. *Id.* § 531. "Multiple use" requires, *inter alia*, that the Secretary manage forest resources "in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources." *Id.* § 531(a). "Sustained yield" refers to "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the

national forests without impairment of the productivity of the land." *Id.* § 531(b).

2. The Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 ("NFMA"), requires a "land and resource management plan" ("forest plan") for each national forest or group of national forests. 16 U.S.C. § 1604(a). A forest plan must "provide for multiple use and sustained yield of the products" from the national forest "in accordance with the Multiple-Use Sustained-Yield Act." *Id.* § 1604(e)(1).

The NFMA requires the Forest Service to adopt "regulations" that "specify[] guidelines for land management plans." *Id.* § 1604(g)(3). The court below suggested inconsistencies between the Wayne Forest Plan and § 1604(g)(3)(F)(v). This clause requires that the *regulations* contain a guideline to ensure that "clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber" will be used only where the "cuts are carried out in a manner consistent with the protection of . . . recreation" and other resources. The court below did not cite the regulations that satisfy this mandate.

3. NFMA forest planning regulations are set forth in 36 C.F.R. Part 219. In general, before a forest plan is adopted, demand for the various resources is assessed, public comments are solicited on a draft plan, and draft and final environmental impact statements ("EISs") describing alternative plans are prepared under the National Environmental Policy Act of 1969 ("NEPA"). 36 C.F.R. § 219.12.

A forest plan provides long-term planning direction. It can remain in effect for up to 15 years, after which it is replaced by a "revised" plan. 16 U.S.C. § 1604(f)(5); 36 C.F.R.

§ 219.10(g). Most first generation NFMA forest plans were adopted between 1982 and 1988. Some 81 revised forest plans are scheduled for release over the next five years. A forest plan may, however, be "amended" at any time. 16 U.S.C. § 1604(f)(4); 36 C.F.R. § 219.10(e).

4. Forest plans and their accompanying EISs typically do not authorize or direct specific ground-disturbing projects or actions. Before any site-specific activity (such as a timber sale) is implemented, the particular activity must first be proposed, analyzed by the Forest Service under NEPA and the NFMA, and formally approved by the agency; if the ground-disturbing activity is approved, it would be subject to judicial review. The Eighth Circuit has summarized the relationship between a forest plan and a site-specific project:

> A forest plan . . . is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur. Indeed, before an environmental change can come about, several events must transpire. First, a site-specific action (e.g., a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would "take[] us into the area of speculation and conjecture."

Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

In its decisions on the Sierra Club's administrative appeals of the Wayne Forest Plan, the Forest Service described the Plan in similar terms: It "establishes a broad programmatic management system," but "specific projects will be proposed and evaluated [later] before final decisions are made."[1]

5. The Forest Service followed the planning approach described above for the then-177,701 acre Wayne National Forest in southern Ohio. *See* Pet. App. 12a-13a, 18a; Fed. Opp. at 5-8. The draft and final EISs analyzed seven alternatives, including alternatives that emphasized primitive recreation and de-emphasized timber production. The final Plan was adopted in January 1988.[2] The Plan contemplates the mix of multiple uses that the Forest Service viewed as providing the greatest net public benefits as follows:

> a. A forest plan assigns land to specific management areas ("MAs"). Each MA promotes a particular set of multiple uses. The plan provides minimum management

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[1] Pet. App. 75a, 87a-88a. *See also* Fed. Opp. at 2-7; Michael J. Gippert and Vincent L. DeWitte, *The Nature Of Land And Resource Management Planning Under The National Forest Management Act*, 3 ENVTL. LAWYER 149, 155-59, 166-69 (Sept. 1996); 60 Fed. Reg. 18886, 18897, 18923 (April 13, 1995) and 56 Fed. Reg. 6508, 6513, 6516, 6518-19, 6530-31 (Feb. 15, 1991) (describing current and proposed planning regulations); Pet. App. 18a.

[2] The Solicitor General has lodged copies of the Land and Resource Management Plan - Wayne National Forest ("Wayne Forest Plan" or "Plan"), Draft EIS ("DEIS"), Final EIS ("FEIS") and Record of Decision with the Clerk of this Court. We will cite to these documents by name. The Joint Appendix ("JA") provides the current Second Amended Complaint ("Complaint"), while the other pertinent materials are found in the Pet. App.

prescriptions for the uses identified for each MA. 36 C.F.R. § 219.11(c).

The Wayne Forest Plan contemplates natural and semiprimitive recreation on over half of the Forest. *See* Plan at 4-63 to 181. For example, MA 2.1 protects areas adjoining fishing and canoeing streams, MA 2.2 provides uneven-aged habitats for hiking and wildlife viewing, MAs 6.1 to 6.3 promote semiprimitive recreation, and MA 8.1 protects unique ecosystems. These MAs comprise 42,201 acres. Natural, nonmotorized recreation is contemplated for the 57,736 acre MA 3.3 as well. The Record of Decision (at 28-29) reflects that the Forest Service ultimately selected a Plan that contemplated more semiprimitive recreation and uneven-aged timber management than alternative plans with higher economic benefits.

b. A forest plan must also "identify lands . . . not suited to timber production." 16 U.S.C. § 1604(k); *see* 36 C.F.R. § 219.14. A forest plan therefore typically categorizes lands found both unsuitable and suitable for commercial timber production. The Wayne Forest Plan (at 4-7) categorized 126,107 acres as potentially "suitable." This categorization does not signify that timber sales will be approved on even a large portion of those lands. Rather, the Plan (at 4-180) predicted that 7,835 acres (6.2% of suitable timber lands, and 4.4% of the entire national forest) would be harvested in the first decade. Even less acreage was in fact harvested over the past decade.

c. A forest plan also describes "probable methods of timber harvest." 16 U.S.C. § 1604(f)(2). The Wayne Plan (at 3-5 and 4-180) anticipated that, from 1986 to 1996, 80% of timber harvesting would be conducted by even-aged methods and 5,075 acres of such cuts would occur. Again, the record

failed to match the Plan's predictions. Only 1,540 acres were harvested by even-aged methods over the period 1988 to 1996. Fed. Opp. at 17.

Administrative and Judicial Review of the Plan

6. In 1988, the Sierra Club and the Citizens Council on Conservation and Environmental Control ("Sierra Club" or "Respondents") filed administrative appeals challenging the Forest Plan. The Plan was affirmed in 1990 and 1992 decisions. Pet. App. 66a-130a. The agency appeal decisions repeatedly noted that, while the Sierra Club had purported to challenge the Plan, its claims were more properly directed to particular project-level decisions that would be made later over the Plan's 10 to 15 year life, would take into account site-specific concerns, and could be challenged at that time. "That a Forest Plan allows decisions to be made to implement projects does not mean that all possible projects consistent with the Forest Plan will go forward. In affirming the Regional Forester's approval of the Forest Plan we do not make any judgment on individual project decisions." Pet. App. 80a; *see id.* at 70a, 75a-88a, 94a, 98a-99a, 106a-107a.

7. On March 18, 1992, the Sierra Club brought this action. The Complaint takes the form of a broad and generalized attack on the Forest Plan and the final EIS. The Complaint states that the challenged agency action is the action of the Forest Service "approving the plan." JA 24. The Plan is alleged to cause "injury . . . by allowing damaging illegal and inefficient use of natural resources." JA 14. The Complaint requests broad relief against the implementation of the Plan, asserting that the court should declare that the entire "plan adopted by the defendants is unlawful" and enjoin "further timber harvest and/or below-cost timber sales until the plan has been revised." JA 24, 26.

The case was heard by District Judge James L. Graham of the United States District Court for the Southern District of Ohio. Judge Graham dismissed the Sierra Club's claims on the merits in a 39-page summary judgment opinion dated March 11, 1994. Pet. App. 10a-48a.

8. The Sierra Club appealed. The appeal was briefed and argued in the 1994-95 time period. The panel finally issued its brief, but broadly-worded, opinion in January 1997. *Id.* at 1a-9a. Chief Judge Martin's opinion rejected the Department of Justice's position that this facial challenge to a forest plan does not create a justiciable controversy. *Id.* at 3a-4a.

After finding the claims justiciable, the Sixth Circuit issued several unusual rulings on the merits. *Id.* at 5a-8a.

a. The panel majority developed the view that the Forest Service is institutionally biased in favor of timber production. *Id.* at 7a-8a. Judge Batchelder wrote separately because she did "not believe that the majority's undocumented broadside against the Forest Service is appropriate." *Id.* at 9a.

b. The court declared that the NFMA creates a strong "protective spirit" for the "recreational value of wilderness" and that the Plan is "in excess of the statutory limitations provided in § 1604(g)(3)(F)(v)." *Id.* at 6a, 8a. The panel seemed to conclude that the NFMA requires the preservation of primitive recreation first and permits timber harvesting -- or perhaps, even-aged cutting -- only as a secondary matter.

c. The panel interpreted 16 U.S.C. § 1604(g)(3)(F)(v) to limit use of "even-aged management" to "exceptional circumstances." *Id.* at 6a.

On October 20, 1997, this Court granted certiorari based on a Petition that raised both justiciability and merits issues.

SUMMARY OF ARGUMENT

Facial attacks on forest plans are not justiciable where, as here, they are based on allegations of environmental injury contingent on the later approval of some specific and separately challengeable ground-disturbing activity (such as a timber sale). The challenged action (the existence of a long-term planning document) did not cause any "imminent" and "certainly impending" environmental injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564-65 & n.2 (1992). Respondents' claim of a "future injury contingent" on a later timber sale action does "not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Article III and prudential ripeness principles limit the context, scope, and timing of judicial review to manageable case-by-case inquiries. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990); *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967). These principles restrict Respondents to contesting a particular timber sale that causes imminent environmental injury. There, judicial review can encompass any portions of the Forest Plan relied upon or applied in a particular timber sale decision.

If jurisdiction exists, the Sixth Circuit erred on three merits issues. First, the panel's view that statutes render the Forest Service institutionally "biased" reflects a basic misunderstanding of the limits of judicial review under the Administrative Procedure Act and undermines the presumptive respect that the judiciary must afford to decisions of administrative agencies.

The Sixth Circuit erred in its interpretations of the National Forest Management Act. It wrongly held that the Forest Service must prefer primitive recreation over timber

production and that the NFMA imposes a stringent duty of recreation "protection." *See United States v. New Mexico*, 438 U.S. 696 (1978). The court also erred in holding that 16 U.S.C. § 1604(g)(3)(F)(v) limits even-aged management to "exceptional circumstances." These holdings are unsupported by the statutory text and are contrary to the agency's interpretation. *See Sierra Club v. Espy*, 38 F.3d 792, 799-802 (5th Cir. 1994).

I. The Plan-Level Challenge Based On Alleged Environmental Injuries From Later And Separately Challengeable Timber Sales Is Not Justiciable

Respondents' effort to mount a generalized facial challenge to the Wayne Forest Plan does not present a justiciable controversy. Two aspects of justiciability are at issue: (1) Article III limits on jurisdiction to "cases or controversies," usually discussed under the heading of *constitutional standing*; and (2) limits on manageable controversies, usually discussed in *prudential ripeness* terms. The circuit courts have split 3-to-2 on the justiciability of such plan-level challenges.[3]

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[3] The Eighth Circuit found Article III *standing* absent in *Sierra Club v. Robertson*, 28 F.3d 753, 757-60 (8th Cir. 1994). The Eleventh Circuit found that Article III and prudential *ripeness* barred a plan-level challenge in *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996). The Sixth Circuit (in this case) and Seventh and Ninth Circuits have found that comparable plan-level challenges do create justiciable controversies, though they disagreed on the theory supporting that conclusion. *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992), and its progeny (e.g., *Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1302-04 (9th Cir. 1993)).

A. Respondents Lack Constitutional Standing To Mount A Facial Challenge To The Wayne Forest Plan

"'To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Federal courts must presume that they lack Article III jurisdiction until a plaintiff proves otherwise. *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990).

1. The Complaint's primary standing theory rests on the allegation that Respondents' members visit portions of the national forest that are potentially "subject to" logging under the Plan. Because the Plan does not approve or require timber harvesting in any given area, Respondents' claim is that its members will suffer environmental injury *if and when* a timber sale is approved in an area that is part of the large universe of areas the Plan preliminarily identifies for possible harvesting. *See* JA 13-14, 24. Respondents maintain that the injury that would follow if the agency decides to harvest on land the Plan classified as suitable for harvest should be sufficient to provide standing for a broad-based facial attack on the premises and the reasoning of the Plan itself. *See* Sierra Club Cert. Opp. at 20 (the "forest plan may be . . . one or two steps up the chain of causation from the final event that injures the plaintiff").

This Court has long held, however, that a "future injury contingent" on a later action -- here, the approval of a particular timber sale affecting a specific parcel of land, following a site-specific decisionmaking process in which a range of issues pertinent to the site and the method of harvesting may be considered -- does "not satisfy the

requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

To have standing, a plaintiff must be "immediately in danger of sustaining some direct injury as a result of the challenged" action. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). The injury must be both temporally "*imminent*" and "*certainly* impending." *Defenders of Wildlife*, 504 U.S. at 564-65 & n.2 (1992). The challenged Forest Plan, by itself, causes no environmental injury to the Sierra Club's members. "Adoption of the Plan does not effectuate any on-the-ground environmental changes." *Sierra Club v. Robertson*, 28 F.3d at 758; *see* pages 4-5, above.

To the contrary, the Plan's designation of suitable timber lands means only that lands are within a large pool of lands available for later timber sale proposals. A site-specific action involving the possible sale of timber must be specifically proposed and subjected to both NFMA and NEPA review, including public comment. At that stage, a range of issues particular to the specific site would have to be addressed and reconciled with the guidance provided by the Plan.

The mere designation of land as "suitable" does not mean that it *will* be harvested, nor does it prescribe *when* it will be harvested. A forest plan speaks in terms of a total "allowable [timber] sale quantity" or ASQ. 36 C.F.R. § 219.16. It does not direct that specific tracts be harvested at any particular time. Only a small percentage of suitable timber lands is "planned" to be harvested during the 15-year life of a plan and even this timber may not actually be harvested. *See* pages 6-7, above.

Moreover, the timber sale *volume* (the ASQ) contemplated by a forest plan may not take place for reasons such as budget

cuts, plan amendments, litigation, and the Forest Service's desire to avoid controversy. *See* 36 C.F.R. § 219.10(e) and (f); 60 Fed. Reg. 18886, 18901, 18905-07 (April 13, 1995) (describing how forest plans often are not fully implemented). For example, Respondents halted two even-aged timber sales through their administrative appeals.[4]

Even more attenuated is Respondents' objection to the Plan on a theory that it relies too heavily on harvesting by even-aged methods. References to clearcutting (or other even-aged management) in the Wayne Plan, or any other plan, set forth guidance on the use of the harvesting method. After the Plan, the question still remains whether an even-aged method will be allowed at a given site, and, if so, subject to what conditions designed to mitigate the method's effects. *See* pages 47-48, below. The Plan "narrows the scope of future environmental analyses, but an environmental analysis will be completed for each project which will focus on site-specific issues, alternatives and environmental consequences unique to the project." Pet. App. 25a. As the agency itself described it:

> The optimality determination [related to the decision whether to allow clearcutting in connection with a specific sale of timber] in the Wayne Forest Plan is appropriate as programmatic guidance that clearcutting is likely to be the preferred method of timber harvest in certain areas of the forest to achieve specific management objectives. However the analysis and final decision on the appropriateness of

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[4] *See* Fed. Opp. at 16 n.11. Though the 1986 Wayne Forest Plan included 126,107 acres in the suitable land base, timber harvesting was predicted to occur on only 7,835 acres for the first decade. Plan at 4-180. In 1988-1996, only 3,381 acres were harvested. *See* Summary Of Harvest On Wayne NF From Stars Database (lodged by the government with the Clerk of this Court).

> even-aged management, or the optimality of clearcutting, must be made as a site-specific determination at the project level during Forest Plan implementation and must follow National Environmental Policy Act procedures.

Pet. App. 76a. Any objection that Respondents may have to clearcutting at a particular site may be addressed in the future by a decision not to employ that method at the site, by a decision to impose conditions on the use of the method that would vitiate any claimed injury at the site, or by a decision not to proceed with the sale at all. Therefore, any "injury" to Respondents is contingent on a range of Forest Service decisions that would be made at the project level.

Thus, a plan's inclusion of lands on the list of suitable lands, or its identification of a specific percentage of timber volume that may be harvested through even-aged methods, or even the adoption of a partial framework (establishing a valuation methodology for recreation or timber, to be used in making specific decisions at some later time) does not cause a sufficiently imminent injury to create standing for Respondents. *Accord Sierra Club v. Robertson*, 28 F.3d at 758-60. Notwithstanding the guidelines of the Plan, it remains unclear whether any particular parcel that might affect Respondents will be harvested, let alone harvested in a particular manner. Determinations about specific parcels will be made later, subject to a number of further decisions and decisionmaking criteria. Standing is lacking on a planning decision that merely means "proceed to the next step." *State of Nevada v. Burford*, 918 F.2d 854, 857 (9th Cir. 1990).

On the flip side, no decision by a federal court overturning the Forest Service's designations of land as suitable, or opining whether clearcutting should be allowed in some general sense, will provide the Sierra Club with any form of concrete redress.

A decision that too much land has been designated as suitable would not provide any assurance that any particular area will be switched from the suitable to the unsuitable class, let alone that it would then be preserved for primitive recreation. Indeed, timber sales for salvage and wildlife improvement purposes can still be held on *unsuitable* lands, thereby causing the same environmental injury. 16 U.S.C. § 1604(k); 36 C.F.R. § 219.27(c)(1). And, the Forest Service can reverse an unsuitability designation at any time and "return these lands to timber production." 16 U.S.C. § 1604(k). Moreover, a change in the percentage of timber that the agency anticipates being cut by even-aged methods would not determine whether any particular tract would, or would not, be harvested in that manner. Not only is a personal environmental injury absent in a plan-level challenge, but the "links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing." *Allen v. Wright*, 468 U.S. at 759.

2. Contrary to the Sierra Club Opp. (at 19-21), standing is not conferred by *Bennett v. Spear*, 117 S. Ct. 1154 (1997). In *Bennett*, the Court found that, due to the "modest" showings needed to survive a motion to dismiss, the *Bennett* plaintiffs were not disqualified from trying to prove standing to challenge a U.S. Fish and Wildlife Service biological opinion that effectively dictated reservoir management by the Bureau of Reclamation. *Id.* at 1163-65. Plaintiffs had challenged the restrictions on the reservoir's operating regime contained in the opinion's incidental take statement, which provided an immediately effective "permit authorizing the action agency to 'take' the endangered species." *Id.* at 1159, 1164-65. In contrast, any specific ground-level effect from the Plan is here contingent on another decision by the same agency (the Forest Service) to proceed with a particular timber sale.

A decision to hold a timber sale will consider site-specific factors *not* already considered in the Plan. This contrasts with the "virtually determinative" nature of an incidental take statement at issue in *Bennett*. A take statement is "virtually determinative," in part, because someone who knowingly "takes an endangered or threatened species" is subject to substantial civil and criminal penalties. *Id.*

Further, the biological opinion at issue in *Bennett* spoke specifically to the water use at issue in the case -- effectively answering a specific question that the plaintiff sought to challenge with respect to the precise injury plaintiff hoped to avoid. In contrast, a forest plan is simply a general planning document that speaks in broad strokes, providing guidelines about the management of a national forest. The application of the Plan at any site will require the consideration of a range of additional factors that could alter or eliminate the alleged environmental injury.

Finally, *Bennett* concerned the opportunity to prove the factual components of standing. Here, the Sierra Club falters on its legal theory of injury: that the existence of a long-term planning document creates a sufficient environmental injury to allow a broad facial attack on a forest plan.

3. The Sierra Club also alleges that it has a special interest in the way national forests are managed, so that the Forest Plan itself "work[s] a direct injury upon plaintiffs and their members by allowing damaging illegal and inefficient use of natural resources in national forest areas." JA 14.

Yet, this Court ruled long ago that the Sierra Club's "organizational interest" in Forest Service actions or in seeing that the law is obeyed is too generalized to confer standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Respondents lack standing as taxpayers (and on related theories) to contest the economics of federal land actions. *E.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-88 (1982); *Churchwell v. Robertson*, 748 F. Supp. 768, 776 (D. Id. 1990) (no standing on below-cost timber sale). Respondents' psychic or "stigmatic injury" in a plan-level challenge is too abstract to be legally cognizable. *Allen v. Wright*, 468 U.S. at 754-56; *see Raines v. Byrd*, 117 S. Ct. at 2317-18, 2320-22 (finding the "institutional injury" to legislators "too abstract" to be "legally and judicially cognizable" in a facial challenge).

4. Finally, it is important to acknowledge that a forest plan might include a specific provision immediately limiting pre-existing uses in some Management Area. An example might be a portion of a forest plan closing an area formerly open to snowmobile or other off-road vehicle use. *See* Fed. Opp. at 10 n.6 and 15. We do not dispute that someone who previously enjoyed snowmobiling in that area might have standing to challenge the designation of the area as off-limits. Such a plaintiff would suffer a direct injury from the forest plan without further Forest Service decisionmaking on an individual project. *See Defenders of Wildlife*, 504 U.S. at 561-62 (1992). This case, however, does not present such a direct injury from a forest plan.

B. Respondents' Facial Challenge To A Broad Land Use Plan Is Not Ripe For Review

Respondents' effort to mount a facial challenge to the Plan is also *not ripe*. This is particularly true under the "fitness for

review" component of this Court's ripeness jurisprudence and, arguably, as an Article III matter as well.[5]

1. With due regard for the constitutional separation of powers, federal courts must resist premature intrusion on the decisionmaking processes of the Executive Branch. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990) ("*NWF*"). A challenge to a broad agency action, such as a "regulation," is ordinarily considered ripe for review only when "the impact of the [action] upon the [plaintiffs] is sufficiently direct and immediate," such as where it requires an immediate change in business practices. *Abbott Lab. v. Gardner*, 387 U.S. 136, 152-54 (1967).

Ripeness principles thus serve "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging party." *Abbott Lab.*, 387 U.S. at 148-49. Where agency action does not *directly* injure a plaintiff, the courts should ordinarily stay their hand. Judicial review "stand[s] on a much surer footing in the context of a specific application of this regulation" or forest plan. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163-64 (1967).

To be sure, "[s]ome statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of

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[5] While this Court addressed the case-by-case approach as a matter of prudential ripeness in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94 (1990), limiting judicial review to *concrete factual contexts* may also be viewed as an Article III constraint. *See Defenders of Wildlife*, 504 U.S. at 575-78; *Valley Forge*, 454 U.S. at 472-74.

judicial review directly, even before the concrete effects normally required for APA review are felt." *NWF*, 497 U.S. at 891. In contrast, Congress did not expressly subject forest plans to programmatic judicial review. Hence, under *NWF*, forest plans are within the normal rule that:

> a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. . . . The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect.

497 U.S. at 891, 894. That reasoning applies here. *NWF* precludes this broad challenge to, and broad relief against, an entire forest plan.

In fact, the Court observed that even where an agency has declared its *intent* "with respect to vast expanses of territory . . . to grant permission for certain activities, to interfere with other activities, and to take other particular action if requested," a challenge may have to await more concrete and imminent harm. *Id.* at 892. "It may well be . . . that even those individual actions will not be ripe for challenge until

some further action or inaction more immediately harming the plaintiff occurs." *Id.*

Consistent with *NWF*, the Sierra Club may, of course, employ a "case-by-case approach," challenging any timber sale that imminently threatens environmental injury. *NWF* allows review of the elements of the forest plan "to the extent that" they were relied upon in the decision to allow that timber sale. The scope and context of judicial review would necessarily be limited to the particular timber sale causing an Article III injury. The scope of relief would be similarly constrained. *See Lewis v. Casey*, 116 S. Ct. 2174, 2183-84 (1996).

Once a timber sale creates the concrete factual context required for a manageable ripe controversy, a court can address those aspects of the forest plan material to the challenged sale. *See* Pet. at 10; Fed. Opp. at 14 n.8; *Sierra Club v. Robertson*, 28 F.3d at 759 (in such a suit, the plaintiff "may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes"). Hence, the argument that plan-level challenges must be allowed or a forest plan "would forever escape review" (Pet. App. 4a) is mistaken. An aspect of the forest plan that actually contributes to a concrete injury would be subject to consideration in the context of such a concrete challenge. Only the aspects of the plan that never cause Article III injury would escape review by an Article III court.

2. Cases applying ripeness principles to zoning ordinances strongly support the conclusion that a facial challenge to a forest plan is not "ripe." Both forest plans and zoning ordinances channel later development proposals, but do not dictate development. In the seminal zoning case, the Court considered a facial challenge to "the ordinance as an entirety"

where it was alleged that the ordinance's "mere existence" caused a "present invasion of appellee's property rights" (direct injury) by lowering property values. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-86 (1926).

The Court declined, however, to consider those aspects of the challenge that depended on how the ordinance would be applied to plaintiff because "it cannot be said that the land owner has suffered or is threatened with an injury which entitles him" to judicial review. *Id.* at 395-96. Such claims would be justiciable when "if ever, the provisions set forth in the ordinance . . . come to be concretely applied to particular premises" -- here, applied in the concrete facts of a particular timber sale. *Id.* at 395. Since *Euclid*, the strong preference for as-applied challenges, presenting issues in a concrete factual setting, runs though the next 70 years of zoning cases. *See Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1664-70 (1997) (summarizing cases).

3. The Eleventh and Eighth Circuits have correctly concluded that plan-level challenges are "unmanageable."[6] The

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[6] [N]o site-specific action will be taken pursuant to the Plan without a second stage of decisionmaking. . . . We have no doubt that some decisions in the Plan make an injury to the appellants [from timber harvesting] more likely. "More likely," however, does not make the injury imminent enough for purposes of judicial decisionmaking. We do not yet know when or how an injury to the appellants will occur, and this factual underpinning is vital to a full-fledged judicial review of the Plan.

Wilderness Soc'y, 83 F.3d at 390-91. "[W]ithout reference to a particular site-specific action" and concrete facts, judicial review becomes unmanageable and "would 'take[] us into the area of speculation and conjecture.'" *Sierra Club v. Robertson*, 28 F.3d at 758 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

complex provisions of a multiple use plan can be misinterpreted too easily, and the plan may not be implemented as the planning document predicts.

This case illustrates well the difficulties with plan-level review.[7] Review occurred in a factual vacuum. The Sixth Circuit apparently thought the Plan dictated rampant clearcutting across the large acreage of suitable lands. This arguably produced the broadsides that the Forest Service is biased, that clearcutting is limited to exceptional circumstances, and that the agency had improperly balanced timber production and primitive recreation uses.

Yet, the facts on implementation are: in the last eight years only 1,540 acres of the now over 177,000-acre Wayne National Forest have been harvested by even-aged methods. *See* pages 6-7, above. If this 1992 facial challenge to the Plan had not been allowed, and if the Sierra Club had waited for a few timber sales to establish a track record, it might not have

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[7] Respondents' merits arguments highlight the difficulty with resolving them outside the context of a specific timber sale decision. With respect to any given site, the generalized prescriptions of the Plan will intersect with the unique facts, including site conditions, pertinent to the particular tract. The agency's appeal decisions repeatedly emphasized the difficulty in addressing Respondents' challenges in the absence of a specific site proposal. Pet. App. 70a, 75a-88a, 94a, 98a-99a, 106a-107a. Similarly, the district court noted that many of Plaintiffs' arguments were directed at asserted failures to address issues "at specific locations" or on a "site-specific basis." Pet. App. 17a. The district court concluded that (Pet. App. 17a):

> A review of the Plan . . . shows that all of these concerns were addressed by the Forest Service and that the applicable statutes and regulations provide for a further assessment of these concerns on a site-specific basis when the Forest Service proposes to pursue specific projects in the forest.

been injured enough to warrant bringing an as-applied challenge. If an as-applied challenge had been brought, review could have been based on concrete facts, instead of speculation. *See Renne v. Geary*, 501 U.S. 312, 322-24 (1991) (review should be postponed until issues "can be litigated in the context of a concrete dispute" under the facts of an "as-applied challenge" where this could "materially alter the question to be decided").

C. The Disposition Is Not Changed By Respondents' Post-Appeal Filings

After the Petition for Certiorari was filed, Respondents sought to cure the standing difficulty by submitting affidavits to the district court. Respondents represent that two timber sale projects have proceeded under the Plan, that Respondents use some of the areas directly affected by these actions, and that the justification for these projects reflected "earlier controlling decision[s] of the Plan."[8] Sierra Club Opp. at 14. On this basis, the Sierra Club argues that "this case does not present the question suggested by Petitioner" regarding the justiciability of broad challenges to a forest plan. *Id.*

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[8] Except for mentioning that two timber sales have occurred, the affidavits merely reiterate the standing theory in the Complaint. For example, the assertion is made that areas "I have hiked or camped (and to which I plan to return) are within the 70% of the Wayne National Forest that are within the timber base, as established by the Wayne National Forest's Land and Resource Management Plan. As a result these areas are now open to timbering, mostly by clearcutting under the plan. . . . My recreational, professional, and scientific interests in these public forest areas will be directly and adversely *harmed if the Forest Service logs* in numerous locations of the Wayne National Forest." Affidavit of Jason Tockman at 2-3 (emphasis added) (attached to Pls.' Renewed Mot. for Summ. J. and Injunctive Relief, copy lodged with the Clerk of this Court).

1. Even if it were appropriate to take into account these post-appeal events and filings, there is no basis for *declining* to consider the justiciability of the Complaint as filed.[9]

Moreover, Respondents' challenge *to the Plan* remains non-justiciable. As filed, Respondents' suit took the form of a broad challenge to the Forest Plan, seeking "to prevent its implementation." Sierra Club Opp. at 14; *see* page 7, above. Because the Sierra Club is not injured by the *Plan*, and there is no justiciable controversy presented by its challenge to the *Plan*, the Sierra Club may not obtain the broad relief sought in its Complaint. The fact that specific actions have since been taken, and those actions might be subject to challenge on specific grounds, does not permit a challenge to the totality of the Plan itself or injunctive relief against the Plan. *See* pages 19-21, above.

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[9] The Court presumably has the power, but is certainly not required, to take into account such post-appeal events and filings. *Cf. NWF*, 497 U.S. at 894-98 (discussing the standard under which a court may consider supplemental affidavits following a summary judgment hearing). Moreover, even if these post-appeal events were found to give the Sierra Club standing to challenge *something* at this time, it would not bar this Court from addressing the important issue whether the Sierra Club had standing when the suit was filed. Events that took place *after* the case was decided by the court of appeals could not, *nunc pro tunc*, cure the jurisdictional defect in the original suit. Moreover, the later course of proceedings does not "moot" the Court's ability to resolve that important question. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125-27 (1974). Indeed, the Court's authority to address such a question is clearer than in other "capable of repetition but evading review" contexts: In most such contexts, the Court lacks actual jurisdiction at the time of its decision, but reaches an important question anyway. Even assuming the Sierra Club's post-appeal affidavits have cured the jurisdictional defect, this Court may consider any question addressed by the courts below as the case proceeded here.

This is precisely the distinction suggested in *Lujan v. NWF*. It is "entirely certain that the flaws in the entire 'program' cannot be laid before the courts for wholesale correction under APA, simply because one of them that is ripe for review adversely affects one of respondent's members." 497 U.S. at 892-93. To the contrary, any effort to challenge Plan provisions in the context of a specific timber sale would require particularized attention to the way that the Plan actually influenced that sale. Respondents, therefore, cannot cite the existence of a timber sale in order to maintain their current generalized Complaint against the Plan. *See id.* at 894-900 (essentially directing the dismissal of the complaint); *Wilderness Soc'y*, 83 F.3d at 391 n.9.

2. The question then remains whether subsequent events and filings should have any effect whatsoever on the way that the Court disposes of the case. If Article III jurisdiction was lacking when the lower courts rendered their decisions and/or is lacking now on the current Complaint, the Court's precedents generally favor reversing on jurisdiction and vacating the opinion below, without further comment on "the merits." *E.g., Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068-72 (1997).

On occasion, however, this Court has found that intervening events have cured prematurity problems, or has otherwise proceeded to address merits issues after considering the hardships to the parties and judicial economy. *E.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-82 (1985); *Environmental Protection Agency v. National Crushed Stone Ass'n*, 449 U.S. 64, 72-73 (1980).

Based on Respondents' affidavits, it appears that there may be a ripe controversy of some sort concerning two timber sales. We believe that the ripe controversy would have to

focus on the facts of the two challenged timber sales and would differ substantially from the current facial attack on the Plan. The facts needed to resolve a challenge to those timber sales are obviously not before the Court.

Nonetheless, in such a case after vacatur and remand of this appeal, the Sixth Circuit is likely to credit its own prior *legal* conclusions on Forest Service bias, on protection of primitive recreation, and on a general ban against even-aged management as set forth in the opinion under review. Respondents say that the timber sales "relied on the earlier controlling decision of the Plan to include the project areas in the suitable timber base." Sierra Club Opp. at 14. In the interest of judicial economy, the Court need not require a "formal amendment" of the Complaint, *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9 (1975), in order to address the legal theories endorsed by the Sixth Circuit.

II. The Panel's Broadside On Agency Bias Is Inappropriate And Inconsistent With Law

The broad and abstract nature of Respondents' challenge to the Plan may have encouraged the broad and abstract declarations of the panel on the merits. The panel's approach was most abstract and, ultimately, destructive in its discussion of alleged Forest Service "bias." The panel's theory of agency bias provided the means by which the court denied deference to the agency's planning effort, and overturned the Plan without any serious consideration of the record and the agency's stated views. The panel's finding of bias denigrated the integrity of the Forest Service and its ability to administer the National Forest System as Congress has directed.

1. The court of appeals panel acknowledged at the outset that "it is generally accepted that federal agencies are entitled

to a presumption of good faith and regularity in arriving at their decisions." Pet. App. 5a. It went on to note, however, that the "presumption is not irrebuttable." *Id.* The panel, therefore, characterized the central question presented by the appeal as "whether the plan has been improperly skewed." *Id.*

After finding the Plan to be "predisposed toward clearcutting," the panel devoted several pages to developing the position that the Forest Service is biased in favor of timber production. App. 7a-8a. The panel ultimately concluded that:

> Each of these biases undermines even the facial neutrality of the National Forest Management Act. Even when there may be more valuable uses for the land, the above biases and constraints cause the Forest Service to manage primarily to maximize timber outputs.

Pet. App. 8a. "Each of these [alleged] biases" is rooted fully in the statutes under which the Forest Service operates.

First, the panel commented that, because the agency was created in part to "ensure a reliable timber supply, the Forest Service has a history of preferring timber production to other uses." Pet. App. 7a. This is an apparent reference to 16 U.S.C. § 475, which provides that national forests are established "to furnish a continuous supply of timber."

Second, by the "sharing of timber proceeds with the communities" surrounding a national forest, the Forest Service "becomes trapped" to issue timber sales as "[r]ural constituencies may provoke politicians to place pressure on the Forest Service to sustain that revenue." Pet. App. 7a. This was apparently a reference to 16 U.S.C. § 500. That section directs that 25% of national forest revenues (e.g., timber, grazing, and recreation revenues) be shared with local counties "for the benefit of the public schools and public roads."

Third, the "Forest Service budgeting process, which allows the Forest Service to keep a percentage of the funds it realizes from timber sales, provides an incentive for the Forest Service to sell timber below cost or at a loss." *Id.* at 7a. Specifically, the Knutson-Vandenberg Act allows timber sale revenues to be devoted to reforestation projects and other Forest Service costs associated with use of the renewable timber resource. 16 U.S.C. §§ 576-76d.

On their face, these statutory provisions reflect Congress' view that the sale of timber is an important national forest objective. The panel, however, viewed these features of existing law as "biasing" the Forest Service in favor of timber cutting and against primitive recreation.[10] On this basis, the panel apparently felt free to ignore the agency's reasoning, and to superimpose its judgment for the agency's, concerning the Forest Plan. In effect, the panel found that Acts of Congress render an agency biased in a judicially remediable way.

2. The Sixth Circuit's notion of bias, undermining the objectivity, integrity, and regularity of agency decisionmaking, carries the concept far beyond where it has been taken before. This may explain why Judge Batchelder disassociated herself from the bias portion of the opinion, stating that she did not "believe that the majority's undocumented broadside against the Forest Service is appropriate." Pet. App. 9a.

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[10] The panel apparently derived these political science/ sociological/economic theories from a book (RANDAL O'TOOLE, REFORMING THE FOREST SERVICE) it cited at Pet. App. 7a. No party had cited this book in its appeal brief. The district court had excluded an extra-record declaration by Mr. O'Toole, tendered by the Sierra Club. Pet. App. 56a-57a. The panel erred by relying on extra-record evidence and argument through the vehicle of Mr. O'Toole's book.

Remediable bias has historically been found only where a decisionmaker is subject to *extra*-legal influences. *Cf. Liteky v. United States*, 510 U.S. 540, 544-45 (1994). The concept of a statute-induced bias that the Sixth Circuit employed has no precedent in administrative law. Its application would allow *every* decision of an agency, no matter how cogently reasoned and well intentioned, to be second-guessed by the courts whenever the decision is perceived to be of some utility to an interest in whose favor the court believed the agency was institutionally biased.

Finding institutional bias because a *statute* creates a particular historic objective for the agency is, of course, an absurdity. An agency cannot be legally biased *because* it follows the law.[11] Precisely because the Forest Service was created to, and continues to be obliged by law to, "ensure a reliable timber supply," it cannot be faulted for doing so. *See* pages 2-3, above. Further, since 16 U.S.C. §§ 500 and 576b were amended by and are parts of the NFMA, the panel's finding that these provisions undermine the "facial neutrality of the" NFMA is nonsensical. Pet. App. 8a.

Equally untenable is the notion that the structural provisions of a law -- that local communities receive a portion of the proceeds of timber harvesting (and thus may "lobby" for such harvesting), or that the Forest Service itself shares in those proceeds -- in and of themselves *improperly* bias the agency's decisionmaking. Congress is presumptively aware of the potential for such structural factors, which it wrote into the

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[11] Conversely, in a non-legal sense, all agencies are "biased" by their statutory mission and sources of funding. For example, the National Park Service is "biased" in favor of preservation due to the mandate for management of national parks in 16 U.S.C. § 1.

law, to influence agency decisionmaking. Yet, notwithstanding such potential, Congress has allowed judicial review of Forest Service actions only under the standards set forth under the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 701-06.

The APA requires that an agency's action be judged on the terms on which the decision is written, according to the standards set forth by the APA and the governing statutes. Thus, review is to be based on the administrative record. Further, the agency's reasoning is to be judged on its own terms, according to the rationale the agency has presented in its decision. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983).

Under the APA, the agency action must be affirmed unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; *see Motor Vehicle Mfrs.*, 463 U.S. at 41-43. A court is not free to dismiss the agency's reasoning out of hand as insincere, biased, or deceitful, based on the court's intuition -- its sense of institutional sociology or psychology -- about subconscious influences on agency decisional processes. Absent nearly "irrefragable" proof of fraud or improper influence to the contrary, the courts are obliged to afford the official decisions of the Executive Branch a presumption that the decisions have been rendered with honesty and integrity. *See, e.g., United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926); *Marine Shale Processors, Inc. v. Environmental Protection Agency*, 81 F.3d 1371, 1385 (5th Cir. 1996).

If Congress believes that the structural aspects of a statute are *improperly* influencing agency decisionmaking, Congress is, of course, free to change the administrative structure or to require the courts to subject particular agency decisions to a

more searching scrutiny.[12] But under the APA as written, "Congress has not empowered [courts] to substitute their judgment for that of the agency. Instead, it has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution." *FCC v. Schreiber*, 381 U.S. 279, 290-91 (1965). Hence, the Sixth Circuit could not use its policy judgment that the Forest Service is institutionally biased to create a duty to promote primitive recreation that is not found in any statute. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-48, 556-58 (1978); *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

3. It is singularly inappropriate for federal courts to make broad judgments about policy for federal lands.[13] The federal courts are constitutionally obligated to follow *congressional* direction on proper use of the public lands. If this were not

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[12] Congress may, of course, fully endorse the view that the timber or tourism interests of local communities surrounding national forests will prompt local support for a particular forest plan. That aspect of participatory democracy does not corrupt the process.

There may be circumstances of actual *improper* influence, in violation of law or statute, in which case there may be a form of judicially remediable bias. There was no evidence of improper influence here.

[13] *E.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibility in the political branches.'") (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978)); *Defenders of Wildlife*, 504 U.S. at 577.

sufficiently clear under separation of powers principles, it follows from the Constitution's Property Clause (Art. IV, § 3).

> The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." [*Light v. United States*, 220 U.S. 523, 537 (1911).] Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy.

United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940); *see Kleppe v. New Mexico*, 426 U.S. 529 (1976).

At bottom, the panel's approach displays an absence of respect for the actions and duties of co-equal branches of government: disrespect for the statutory mandate established by Congress and disrespect for the Forest Service in carrying out that mandate. The panel has unfairly impugned the integrity of an entire agency and compromised its mission, stripping the agency of the deference that is its due under the APA and constitutional separation of powers.

III. The Sixth Circuit Erred In Finding That The Wayne Forest Plan Violates The NFMA

The principle that an expert agency is entitled to deference on policy choices, legal interpretations, and technical judgments -- upon a showing that the agency has properly considered and addressed all of the relevant criteria -- was found determinative of Respondents' challenges in the district court. *See* Pet. App. 11a-12a, 32a, 40a, 47a. The panel's perception of agency "bias" served to strip the Wayne Forest Plan of the presumption of regularity, allowing the panel to substitute its policy preferences for those of the expert agency.

The panel claimed to find "bias" exemplified in the Plan's treatment of clearcutting and primitive recreation, concluding that the "planning process was improperly predisposed toward clearcutting" and "arbitrarily undervalu[ed] the recreational value of wilderness." Pet. App. 5a-6a. The panel's reasoning process demonstrates how far it strayed beyond the sustainable limits of judicial review. Without *any* reference to the administrative record or *any* citation of case law, the panel reasoned that:

> Timbering simply does not promote the kind of recreational activities that are in demand in the Wayne . . . . In that particular environment, clearcutting loses its value . . . . The National Forest Management Act mandates that the Service ensure that even-aged management practices be used in the national forests only when "consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource." 16 U.S.C. § 1604(g)(3)(F)(v). The National Forest Management Act thus contemplates that even-aged management techniques will be used only in exceptional circumstances. Yet, the defendants would utilize even-aged management logging as if it were the statutory rule, rather than the exception. By arbitrarily undervaluing the recreational value of wilderness . . . . the Forest Service improperly concluded that clearcutting was necessary . . . . [W]e find that the Forest Service has failed to comply with the protective spirit of the National Forest Management Act. We further find that this non-compliance is an arbitrary act in excess of the statutory limitations provided in § 1604(g)(3)(F)(v).

Pet. App. 6a, 8a. Through this broad reasoning, the panel seems to have concluded that: (1) a court can override the Forest Service's policy judgment on the mix of multiple uses in a national forest; (2) primitive recreation should be

preferred over timber harvesting; (3) the NFMA has a strong protective spirit and creates enforceable environmental protection standards; (4) even-aged cuts are barred save for exceptional circumstances; and (5) the Plan improperly concluded that clearcutting is necessary. None of these propositions withstands serious scrutiny.

1. Making policy choices among multiple uses is a function Congress assigned to the Forest Service. The Sierra Club's and Sixth Circuit panel's "policy arguments [on the "best" management of national forests] are more properly addressed to legislators or administrators, not to judges." *Chevron*, 467 U.S. at 864.

The Multiple-Use Sustained-Yield Act and NFMA allow national forests to be managed for "sustained yield" and a variety of "multiple uses," which include both "outdoor recreation" and "timber" production. 16 U.S.C. §§ 528, 1604(e)(1). These statutes do not specify acreage to be devoted to, or the weight the Forest Service must attach to, any particular use. These statutes assuredly do not grant a priority to "recreation" uses, let alone to any specific form of recreation, such as wilderness or primitive recreation.[14]

[14] While the panel seems to have been concerned primarily with the "recreational value of wilderness" (Pet. App. 6a), this is only one of many forms of recreation and is called "primitive recreation" by forest planners. *See* DEIS at B4-4 to 17. Neither wilderness recreation nor primitive recreation are mentioned in, much less singled out for special protection in, the NFMA and MUSYA. The statutes use the more general term "outdoor recreation." The regulations call for a "broad spectrum of outdoor recreation opportunities" and establish no preference for, or minimum acreage for, primitive recreation. 36 C.F.R. § 219.21. Thus, in its multiple use balancing, the Forest Service must consider recreational uses other than primitive recreation.

Instead, MUSYA recognizes that the inevitable consequence of mixed use is that "some of the land will be used for less than all of the resources" and that "impairment" of some resource values is inherent where there are conflicting multiple uses. *Id.* § 531(a).[15] So does the NFMA. *See* pages 38-43, below. Decisions about the best and most advantageous uses have been entrusted to the Forest Service.

Such provisions "breathe discretion at every pore." *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979); *Big Hole Ranchers Ass'n v. United States Forest Serv.*, 686 F. Supp. 256, 264 (D. Mont. 1988) (the "Forest Service has wide discretion to weigh and decide the proper uses within each area"). The courts must "defer to the agency's determination" of the appropriate "trade-offs" among conflicting multiple uses. *Sierra Club v. Espy*, 38 F.3d 792, 800-02 (5th Cir. 1994).

The Forest Service's attention to the need for timber as reflected in the Plan falls squarely within the range of permissible discretion entrusted to the agency. Had the Forest Service failed to provide for timber harvesting, it would have been derelict in its duties, for the "harvesting of timber is and always has been one of the purposes of the National Forest

[15] Section 531's grant of policy-based discretion is exceptionally broad. The Secretary is to manage "the various renewable resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services." *Id.*

System." Pet. App. 14a. The balanced Plan also provides for considerable primitive recreation.[16]

2. The Sixth Circuit's notion that primitive recreation must be preferred over timber production actually seems to invert the priorities set by Congress. National forests can be established only for certain primary purposes, including to "furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. MUSYA broadened the uses to which national forest lands could be put. But these newer uses, such as "recreation," were *not* to be exercised "in derogation of" the timber production purpose in "section 475." *Id.* § 528.

The Court squarely addressed these provisions in *United States v. New Mexico*, 438 U.S. 696 (1978), and distinguished between the primary and secondary purposes of federal land reservations, *id.* at 702. Under § 475, the primary purposes of the national forests include "furnish[ing] a continuous supply of timber for the people." *Id.* at 707. Under § 528, recreation is a "*secondary* purpose[]," which is "supplemental to, but not in derogation of," primary purposes like timber production. *Id.* at 714-15.

The NFMA was not specifically addressed in the *New Mexico* opinion. But the structure of the NFMA does not alter

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[16] The Plan allocates substantial acreage to primitive recreational uses, and was modified to be sensitive to such uses. *See* page 6, above. For example, to provide for more primitive recreation and other natural values, the Plan proposes to *decrease* historic timber production levels and to meet only 40% of timber demand. Pet. App. 71a, 101a. Regardless of the acreage the Plan formally *reserves* for primitive recreation, lands that are ultimately not developed (e.g., where the acreage of timber sales is less than projected) also remain fully available for primitive recreation.

the Forest Service's ultimate authority to set multiple use priorities and protection standards consistent with the MUSYA. Instead, the NFMA reinforces the basic multiple use mandate of MUSYA. The NFMA reemphasizes that a forest plan must "provide for multiple use and sustained yield of the products" (e.g., timber products) from a national forest "in accordance with the Multiple-Use Sustained Yield Act." 16 U.S.C. § 1604(e)(1). The "sustained yield" concept emphasizes "achievement" of a "high-level annual or regular periodic output of the various renewable resources," such as timber outputs through periodic timber sales. *Id.* § 531(b).

The NFMA is designed to ensure that the Forest Service fully *takes into account* a range of environmental and recreational issues. *See* 16 U.S.C. § 1604(g)(1)-(3). In other words, the NFMA, much like NEPA (42 U.S.C. § 4332), requires the agency to take a hard look at environmental effects (thereby procedurally channeling discretion), but does not place any explicit limit on how the agency is to rank multiple uses or set environmental protection standards in any particular instance. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). After the NFMA, use of the national forests for timber production remains a fundamental priority, not denigrated in relation to recreational or other uses.[17]

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[17] *See* 16 U.S.C. §§ 1601(d), 1604(e) and (m). While the NFMA emphasizes that timber harvesting should occur in an environmentally sensitive manner, Judge Posner found it equally true that the "Forest Service is not forbidden to consider the benefits to loggers, and hence to consumers of wood products, in deciding how to manage our national forests" -- "national forests, unlike the national parks, are not wholly dedicated to recreational and environmental values." *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 448

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3. The Sixth Circuit's effort to find in the NFMA itself some substantive limit was fundamentally misplaced. If there were to be some substantive re-ordering of historic priorities, one would look to the *regulations* or the forest plan, not the NFMA provision (§ 1604(g)(3)(F)(v)) cited by the panel.

For example, to focus the issues presented in this case, the NFMA simply states that the Agriculture "Secretary shall . . . promulgate regulations" that will "specify[] guidelines for land management plans," including a guideline "insur[ing] that" even-aged "cuts are carried out in a manner consistent with the protection of" recreation and other resource values. 16 U.S.C. § 1604(g), (g)(3) and (g)(3)(F)(v). Instead of setting environmental protection standards by statute, Congress chose to allow the Forest Service itself to establish such standards in the regulations and the forest plans it publishes.

The NFMA's legislative history confirms Congress' intention to entrust discretion to the Forest Service to use its forest planning process and professional expertise to select a mix of multiple uses and desirable resource protection

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[17](...continued)
(7th Cir. 1990).

"[S]o long as Congress requires this Forest to be managed with multiple-use principles, portions of the Forest must embody a compromise between 'natural' Forest conditions and the need for Forest resources" like timber. *Krichbaum v. Kelley*, 844 F. Supp. 1107, 1119 (W.D. Va. 1994), *aff'd*, 61 F.3d 900 (4th Cir. 1995). "Maintenance of a pristine environment" runs "counter to the notion that NFMA contemplates both even- and uneven-aged management." *Sierra Club v. Espy*, 38 F.3d at 800. Preserving the forest in some pristine state "collides with the multiple uses that Congress has endorsed for the national forests in NFMA." *Sierra Club v. Robertson*, 784 F. Supp. 593, 599 (W.D. Ark. 1991), *aff'd*, 28 F.3d 753, 757 (8th Cir. 1994).

standards. As summarized by the Committee of Scientists established pursuant to 16 U.S.C. § 1604(h) to assist in developing regulations to implement the NFMA:

> [T]he legislative history of RPA/NFMA clearly bears out that Congress deliberately chose a planning process, rather than prescriptive guidelines, as the preferred method of dealing with the complex issues confronting the National Forest system. This was the choice inherent in the debate between the Randolph and Humphrey bills in the Senate.

44 Fed. Reg. 26602-03 (May 4, 1979).

Because any immutable environmental protection standard could be inappropriate somewhere in the "wide range of climatic conditions, topography, geologic and soil types, [and] vegetative covers" encountered in the over 100 national forests stretching from Florida to Alaska, the Senate Committee on Agriculture and Forestry "decided it would be unwise to legislate national prescriptions such as contained in S. 2926," Sen. Jennings Randolph's bill. S. Rep. No. 94-893 at 26 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6685. The Senate instead chose the more flexible approach of S. 3091, Sen. Hubert Humphrey's bill, which became the NFMA.[18]

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[18] The Senate granted the Forest Service the discretion to "promulgate regulations" that would develop appropriate "guidelines and standards to be applied in land management planning." 1976 U.S.C.C.A.N. at 6673; *see id.* at 6663-65. As Rep. Weaver described during the House Committee's mark-up, the Senate bill "left the details and the planning of forestry to the foresters" and the absence of statutory standards that apply directly to a forest plan or on the ground would "avoid lawsuits." BUSINESS MEETINGS ON NATIONAL FOREST MANAGEMENT ACT OF 1976, COMM. ON AGRIC., U.S. HOUSE OF REP., 94TH CONG., 2D SESS. 252-53 (Comm. Print 1976). In contrast, the "House subcommittee bill, by statute" would have contained the

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